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IN THE

Supreme Court of the United States

October Term, 1981

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and BELL TELEPHONE LABORATORIES, INC.,
Petitioners,

—against—

PHONETELE, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners submit this reply in further support of their petition that a writ of certiorari be issued to review the judgment herein of the United States Court of Appeals for the Ninth Circuit. The Brief in Opposition submitted by respondent largely avoids the issue presented by the Petition: the conflict between regulation and the antitrust laws. The decision below adopts a test for the accommodation of the legal standards of the antitrust laws and the Communications Act of 1934 that squarely conflicts with this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), as well as with

its precedents holding that conduct pervasively regulated under common carrier principles is immunized from antitrust attack. This conflict presents an important federal issue of continuing vitality which warrants review by this Court. *See* Sup. Ct. R. 17.1(c).

ARGUMENT

AN IMPORTANT ISSUE OF IMPLIED ANTITRUST IMMUNITY WARRANTING REVIEW BY THIS COURT IS PRESENTED BY THIS CASE

A critical legal question, starkly presented by this case, is whether a finding of implied antitrust immunity arises from the existence of a "conflict in standards" between the antitrust laws and the regulatory statute at issue, which is the teaching of *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), or, instead, from a "conflict in fact" between the application of the antitrust standard and particular regulatory policies adopted at a given time by the agency, upon which the Court of Appeals focused in the instant case. An equally significant question, also presented here, is whether, consistent with this Court's prior decisions (*see* Petition at 20-23), antitrust jurisdiction may extend to conduct, such as petitioners' interconnection tariffs, that is subject to pervasive, common carrier regulation.

These issues are neither "well settled" in a majority of the circuits, as respondent asserts (Brief in Opposition at 1), nor are they important only to the particular litigants. Rather, the opinions of the Court of Appeals in this case and of the only two other appellate courts which have had occasion to deal with the issue reveal markedly different analyses by those courts of the scope of regulation under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1976), and of the extent of any implied antitrust immunity thereby conferred. More significantly, the opinion of the court below demonstrates a fundamental misunderstanding

of, and conflict with, this Court's decisions regarding accommodation of the antitrust and regulatory regimes that is of substantial public importance and warrants plenary review by this Court.

Contrary to respondent's claim, the question of implied antitrust immunity for the interconnection tariffs at issue in this case has not been decided by the Second, Fifth or District of Columbia Circuits.[1] That issue previously has been treated, with disparate analyses, in *Sound, Inc. v. American Tel. & Tel. Co.*, 631 F.2d 1324 (8th Cir. 1980), and *Essential Communication Systems, Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979), *rev'g* 446 F. Supp. 1090 (D.N.J. 1978).

Like the decision in the instant case, the Eighth Circuit in *Sound* looked to the FCC's exercise of its authority under the regulatory scheme, rather than to the legal standard under which the agency exercised its authority. 631 F.2d at 1330. It then based its finding that petitioners' conduct was not immune from

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1. *Northeastern Telephone Co. v. American Tel. & Tel. Co.*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 50 U.S.L.W. 3650 (Feb. 22, 1982), cited by respondent, did not involve a challenge to the legality of petitioners' post-*Carterfone* tariffs, but only, insofar as is relevant here, the narrow issue of the design of protective connecting arrangements provided under those tariffs. 651 F.2d at 81, 94. *Northeastern* thus involved a far more limited context than that presented here, as the Court of Appeals acknowledged. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 742 n.65 (9th Cir. 1981); A-44-45.

Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co., 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), found no implied antitrust immunity with respect to the initial refusal of one telephone common carrier to connect its facilities with those of another, an entirely different issue from that presented here and a matter which the district court had found was "itself not subject to regulatory supervision." *Woodlands Telecommunications Corp. v. American Tel. & Tel. Co.*, 447 F. Supp. 1261, 1265-66 (S.D. Tex. 1978).

Finally, respondent's conclusion that the District of Columbia Circuit "would also be in agreement" on the issue (Brief in Opposition at 2) is evidently based solely upon its own speculation as to any eventual review on the merits of the district court opinions in *United States v. American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976), 461 F. Supp. 1314 (D.D.C. 1978), a case involving a far broader claim of implied antitrust immunity. Petitioners unsuccessfully sought interlocutory review of that decision pursuant to the All Writs Act, 28 U.S.C. § 1651. *American Tel. & Tel. Co. v. United States*, No. 77-1009 (D.C. Cir., May 26, 1977), *cert. denied*, 434 U.S. 966 (1977).

antitrust attack upon its conclusion that the FCC's decisions "have not reflected an approval of Bell's interconnect-related conduct" and that therefore "the maintenance of an antitrust suit will not conflict with the operation of the regulatory scheme. . . ." *Id.* In the single other decision with respect to this issue, the Third Circuit in *Essential* interpreted the Communications Act of 1934 as governing only the relationship of common carriers with subscribers, and thus concluded that there can be no implied antitrust immunity when a competitor sues under the antitrust laws, even though there would likely be such immunity if a customer brings an antitrust suit.[2]

Respondent also asserts that the issue for review as framed in the Petition is not actually presented by this case because it is "patently incorrect" that petitioners Western Electric and Bell Laboratories (respectively, the manufacturing and research and development organizations of the Bell System) are subject to pervasive common carrier regulation. Brief in Opposition at 2. That assertion is wrong on two grounds. First, the FCC's statutory mandate confers ample control over the functions of these entities through its comprehensive regulation of their common corporate parent, petitioner American Telephone and Telegraph Company ("AT&T"). *See, e.g.*, 47 U.S.C. §§ 205(a), 214(d) (authorizing FCC to assure provision of adequate service and facilities); *cf. id.* § 215(a) (imposing agency duty to "examine transactions entered into by any common carrier which relate to the furnishing of equipment . [or] research"). Over the years, the FCC has repeatedly exercised its statutory authority to examine the various facets of Western's operations,[3] and in Phase II of Docket 19129, the Commission undertook an investigation encompassing "all ramifications of the relationship of Western

2. The Court of Appeals in the instant case declined to follow *Essential* and explicitly expressed its own "doubt regarding th[at] court's interpretation of the [Communications] Act's history." 664 F.2d at 734 n.46; A-37.

3. As part of formal docket proceedings, the FCC has considered alternatives to procurement from Western, *AT&T, Revisions of Tariffs F.C.C. Nos. 259 and 260* (Docket No. 19419), 33 F.C.C.2d 518 (1972); vertical integration in the Bell System, *Economic Implications and Interrelationships Arising from Policies and Practices Relating to*

Electric to the Bell System," as well as aspects of the role of Bell Laboratories. *AT&T, Charges for Interstate Telephone Service* (Docket No. 19129), 38 F.C.C.2d 213, 244 (1972), 64 F.C.C.2d 1 (1977). Moreover, this Court long ago noted that Western's prices and rate of return may properly be subjected to scrutiny by state regulatory commissions as part of the ratemaking process. *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133 (1930); *Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318 (1922). In the exercise of that mandate, many states in the ensuing years have conducted inquiries into numerous aspects of that company's operations.[4]

But even without such comprehensive regulatory scrutiny of their business activities, respondent's assertion that immunity may be defeated by these two entities' mere status as named defendants is without merit. Courts in similar cases have repeatedly dismissed antitrust claims against both regulated and unregulated companies on the basis of implied immunity. *See, e.g., Gordon, supra*; *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *accord, Jeffrey v. Southwestern Bell Telephone Co.*, 518 F.2d 1129 (5th Cir. 1975). Thus, in *Gordon*, this Court, having

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Customer Interconnection, Jurisdictional Separations and Rate Structures (Docket No. 20003), 61 F.C.C.2d 766 (1976); Western's centralized purchasing role and the release of patent and technical information, *AT&T, Investigation into the Lawfulness of Tariff F.C.C. No. 267, Offering a Dataphone Digital Service Between Five Cities* (Docket No. 20288), 50 F.C.C.2d 501 (1974); and sales to non-Bell customers, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities* (Docket No. 16979), 28 F.C.C.2d 267 (1971); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)* (Docket No. 20828), 72 F.C.C.2d 358 (1979).

4. *See, e.g., Pacific Tel. & Tel. Co.*, 86 P.U.R.3d 497, 503, Addendum, 87 P.U.R.3d 487 (Cal. Pub. Utils. Comm'n 1970); *Southwestern Bell Tel. Co.*, 98 P.U.R.3d 30, 35 (Kan. Corp. Comm'n 1973); *City of Miami v. Florida Pub. Serv. Comm'n*, 208 So.2d 249, 261 (Fla. 1968); *Pacific Northwest Bell Tel. Co.*, 92 P.U.R.3d 433, 439 (Or. Pub. Util. Comm'r 1971); *Southern New England Tel. Co.*, Docket No. 11200, p. 29 (Conn. Pub. Utils. Comm'n, April 21, 1972); *Southern Bell Tel. & Tel. Co.*, 3 P.U.R.4th 406, 409 (S.C. Pub. Serv. Comm'n 1973).

concluded that the defendant stock exchanges' commission practices challenged by that plaintiff were impliedly immunized from antitrust attack, dismissed the action both against those parties and the defendant member firms, although the latter were not directly subject to the statutory provision there in issue. The same result should obtain in the instant case, because the gravamen of respondent's complaint is its challenge to the protective connecting arrangement requirement that was prescribed in the post-*Carterfone* tariffs filed by AT&T.[5]

Respondent further argues that the narrow express exemption from the antitrust laws for consolidations and acquisitions in section 221(a) of the Communications Act, 47 U.S.C. § 221(a), necessarily precludes any finding of implied immunity arising from the regulatory scheme created by the Act. Brief in Opposition at 14. This argument has been specifically rejected in numerous decisions holding that the existence of an express immunity provision in a regulatory statute does not foreclose a finding of implied immunity for conduct not covered by the express exemption. *See Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 n. 14 (1973); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Terminal Warehouse Co.* v. *Pennsylvania R. R.*, 297 U.S. 500 (1936); *Mt. Hood Stages, Inc.* v. *Greyhound Corp.*, 555 F.2d 687, 691 (9th Cir. 1977), *rev'd on other grounds*, 437 U.S. 322 (1978); *International Tel. & Tel. Corp.* v. *General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 (9th Cir. 1975).[6]

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5. *Group Life & Health Insurance Co. v. Royal Drug Co., Inc.*, 440 U.S. 205 (1979), cited by respondent, is inapposite. In that case, this Court held that direct contractual arrangements between the defendant pharmacies and Blue Shield did not come within the exemption from the antitrust laws of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, for "the business of insurance." Its holding was based in part upon the fact that the pharmacies were entities entirely outside the insurance industry, and also upon its expressed doubts that Blue Shield itself constituted an enterprise in "the business of insurance." 440 U.S. at 213-15, 229-30. Here, by contrast, the activities of all petitioners are integrally related to the provision of regulated telecommunications services and AT&T is indisputably subject to such regulation.

6. Respondent's reliance upon *California* v. *FPC*, 369 U.S. 482 (1962), is misplaced; that decision was specifically premised on the fact

Finally, respondent argues that it is inconsistent for petitioners to assert implied antitrust immunity for the interconnection-related conduct at issue in this case after dismissal of a 1974 Government divestiture action and agreement to modification of a 1956 consent decree entered in a prior Department of Justice antitrust action. *See* "Modification of Final Judgment" in *United States v. Western Electric Co., Inc.*, Civil Action No. 17-49 (D.N.J., filed Jan. 11, 1982), *reprinted at* 5 *Trade Reg. Rep.* (CCH) ¶ 50,807. The 1949 case in which that consent decree was entered, however, did not involve petitioners' then-extant interconnection practices, much less their post-*Carterfone* tariffs and related conduct in the period after 1968. In short, the "Modification of Final Judgment" does not "conced[e] antitrust court jurisdiction" over the issues involved here, as respondent erroneously asserts (Brief in Opposition at 18).

Thus, the issue presented by the Petition cannot be mooted. To the contrary, during the pendency of the Government's divestiture action, the statute of limitations for actions by private antitrust plaintiffs was suspended by 15 U.S.C. §16(i); although a number of such suits were filed during that period and are presently pending (*see* Petition at 24), it may be anticipated that additional customers or competitors of petitioners in the provision of telephone terminal equipment will now file such suits before the statute of limitations runs. Resolution by federal courts on a piecemeal basis of the complex issue of implied antitrust immunity for petitioners' interconnection-related conduct would pose substantial judicial burdens which can be alleviated only by granting the instant Petition.

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that no pervasive regulatory scheme was involved and there was no other basis for any implied immunity. *See* Petition at 21. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966), cited by respondent, is also inapposite. The *Carnation* decision turned upon the unique language of the express exemption from the antitrust laws contained in the Shipping Act (46 U.S.C. § 814) under which rate-making agreements are explicitly made lawful, and therefore exempt, only when and as long as approved by the Commission. Because the terms of the express statutory exemption were not met in that case, this Court held that an action could be brought under the antitrust laws.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: August 20, 1982

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